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All Other Breaches: State Practice and the Geneva Conventions' Nebulous Class of Less Discussed Prohibitions

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NOTES

ALL OTHER BREACHES: STATE PRACTICE AND THE GENEVA CONVENTIONS' NEBULOUS CLASS OF LESS DISCUSSED PROHIBITIONS

*Jesse Medlong**

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INTRODUCTION

With respect to the protections afforded by the Geneva Conventions,¹ a great deal of ink has been spilled in recent years over the two-tiered system of tribunals employed by the United States in its prosecution of enemy combatants in the “war on terror.”² Less discussed, though, is the wholly separate two-tiered system for sorting violators of the Geneva Conventions that emerges from the very text of those agreements. This stratification is a function of the Conventions’ distinction between those who commit “grave breaches” and those who merely commit “acts contrary to

* J.D., University of Michigan Law School, 2013; M.S., International Relations, Troy University, 2009; B.S., Political Science, University of Maryland University College, 2007. I owe a debt of gratitude for the input and help of my fellow editors, but especially Katie Martin-Browne, John Whitaker, and Alex Link. I am also indebted to Professor Julian Mortenson, whose suggestions helped me to rein in my less disciplined ambitions for this Note. Finally, I’d like to thank my wife for her patience and support, without which the production of this Note would have been tremendously painful.

1. Unless I refer to them individually, my references to the Geneva Conventions throughout this Note are intended as shorthand for both the Conventions and Addition Protocol I, which is the only of the Additional Protocols technically to address grave breaches.

2. See, e.g., *Legal Issues Regarding Individuals Detained by the Department of Defense as Unlawful Enemy Combatants: Hearing Before the S. Comm. on Armed Services*, 110th Cong. 37-48 (2007) (statement of Prof. Neal K. Katyal regarding legality and wisdom of employing a “two-tiered justice system” for the prosecution of terrorism suspects).

the provisions of the present convention”³ or “all other breaches,”⁴ which are also sometimes referred to as “simple breaches”⁵ or “minor violations.”⁶

Relatively little has been written regarding these minor breaches; they have typically been dismissed as “not important enough” to justify thorough treatment.⁷ Although the original Conventions are clear that High Contracting Parties are to “take measures necessary for the suppression of *all* acts contrary to the provisions of the present Convention other than . . . grave breaches,”⁸ no other mention of such other-than-grave breaches is made within their text. In his authoritative commentary on the Geneva Conventions, Jean Pictet—whom the International Committee of the Red Cross (ICRC) has called the “main architect of the Geneva Conventions”⁹—posits that the duty to suppress all breaches of the Conventions requires High Contracting Parties to legislate enforcement mechanisms for suppressing simple breaches;¹⁰ nevertheless, states parties that have taken the extraordinary step of legislatively proscribing—let alone criminalizing—minor violations are rare enough that they remain notable exceptions from the mainstream of state practice.¹¹

Irrespective of these presumed legislative duties regarding minor breaches, there is a vital distinction made in the Conventions between the

3. Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

4. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 86, Jun. 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Additional Protocol I].

5. M. Cherif Bassiouni, *Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of 12 August 1949*, 8 RUTGERS-CAM L.J. 185, 195 (1977).

6. José Luis Fernández Flores, *Repression of the Law of War Committed by Individuals*, 31 INT'L REV. RED CROSS 247, 264 (1991).

7. See *id.* at 266 (“Simple breaches or minor violations have purposely not been expressly enumerated, because it was considered that they were not important enough to call for universal jurisdiction and such a list would have been too long.”) (footnotes omitted).

8. See Geneva Convention III, *supra* note 3, art. 129 (emphasis added).

9. Int'l Comm. of the Red Cross [ICRC], *Henry Dunant Medals Awarded at Red Cross Red Crescent Council of Delegates*, ICRC RESOURCE CENTRE (Nov. 17, 2005), <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/council-delegates-news-171105.htm>.

10. ICRC, *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 368 (Dec. 30, 1952) (“It is thus clear that all breaches of the present Convention should be repressed by national legislation. . . . Furthermore . . . the authorities of the Contracting Parties should issue instructions in accordance with the Convention . . . and arrange for judicial or disciplinary proceedings to be taken in all cases of failure to comply with such instructions.”) [hereinafter Pictet]. *But cf. id.* at 370 (“Violations of certain of the detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature, and there could be no question of providing for universal measures of repression in their case.”).

11. Ireland’s Geneva Conventions Act of 1962 is such an exception. See Geneva Conventions Act, 1962, (Act No. 11/1962) (Ir.), available at <http://www.irishstatutebook.ie/1962/en/act/pub/0011/print.html>; see also Flores, *supra* note 6, at 271 n.65.

jurisdiction granted for grave breaches and that granted for simple breaches. Whereas the Conventions provide the basis for invoking universal jurisdiction—that is, jurisdiction to adjudicate and enforce violations everywhere and at any time—over grave breaches¹² (and probably for other “serious violations,” if such a classification is distinct from grave breaches),¹³ responsibility for the enforcement of minor breaches is understood to reside entirely with either the violator’s state or the state in whose territory the breach occurred, if the accused is in that state’s custody.¹⁴ The fact that discretion to enforce and punish minor breaches against individuals is left to the violator’s own national state, combined with the fact that nearly all states parties have declined to exercise such discretion through affirmative legislation,¹⁵ says something important about the meaning of the Conventions with respect to these “other” breaches.

Under the Vienna Convention on the Law of Treaties (VCLT), subsequent state practice with respect to a treaty’s application is an important factor to be taken into consideration when interpreting that treaty’s provisions.¹⁶ This means that, despite M. Pictet’s impression to the contrary, widespread (or uniformly nonuniform) state practice in this area is more likely an indicator of the Conventions’ meaning than a violation of their terms. Thus, the absence of state practice confirming a legislative requirement (and significant practice implementing other modes of suppression) suggests by way of positivist inference that most states, by and large, intended not to be bound by such a requirement. States seem to interpret

12. See Roger O’Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT’L CRIM. JUST. 811, 811–12 (2009) (“[T]he term ‘universal jurisdiction’ refers to the competence of a state under international law to criminalize and, should the occasion arise, prosecute conduct when no other internationally recognized prescriptive link—chief among them territoriality, nationality, passive personality and the protective principle—exists at the time of the alleged commission of the offence.”) (footnotes omitted). Universal jurisdiction of this sort is sometimes characterized as a duty to prosecute, but it is more accurately framed as an obligation to prosecute or extradite. See, e.g., Steven Ratner, *War Crimes, Categories of, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 374, 375 (Roy Gutman & David Rieff eds., 1999). But as Professor Ratner notes, this does not necessarily mean that states have lived up to this obligation. “The more pervasive pattern,” he writes, “is either mere administrative punishment or impunity.” *Id.* at 376.

13. For a discussion of this possible distinction in the context of war crimes more generally, see *Summary Records of the 2107th Meeting*, [1989] 1 Y.B. Int’l L. Comm’n 73, U.N. Doc. A/CN.4/SR.2107 (arguing with respect to the Draft Code of Crimes Against Peace and Security that it might be appropriate to expressly incorporate all “serious violations of the rules of international law applicable in armed conflicts” into the definition of war crimes); *id.* at 74 (“[I]t would be useful to draw upon the acts listed in article 147 of the Fourth Geneva Convention in characterizing ‘grave breaches,’ even if the Special Rapporteur preferred to use the expression ‘serious violations’”).

14. RATNER, *supra* note 12, at 375.

15. See discussion *infra* Part II.

16. Vienna Convention on the Law of Treaties art. 31(3)(b), May 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

this duty as entailing some other manner of obligation.¹⁷ The key questions, then, are how states understand (and implement) this onus, and what the implications are of a meaning induced from such practice. I postulate that, despite the near total absence of literature on this subject, the nature—and prevalence—of nongrave breaches may have profound effects on the structure of international humanitarian law (IHL) as a whole.

In the hope of elucidating the answer to the questions above and demonstrating the outsized importance of this breed of prohibitions, this Note will proceed as follows. Part I describes the sorts of conduct that qualify as minor breaches of the Geneva Conventions in an attempt to provide some contours to this class of violations. Part II is a brief survey of state practice with respect to these breaches, which demonstrates the high degree of variability in the means employed for suppressing such breaches. Part III then addresses the broader inquiry of what the duty to suppress “means” in light of standard interpretative methods, but with especial attention to state practice as an interpretative tool. Part IV asks what the implications are of a duty to suppress nongrave breaches, so construed, and attempts to provide some preliminary answers. Finally, I conclude the discussion by attempting to frame the issue so as to spur further development of this underexplored subject.

I. DEFINING “MINOR BREACHES” OF THE GENEVA CONVENTIONS

The character of international law has been described (perhaps generously) as “somewhat nebulous.”¹⁸ Nevertheless, the contours of most rules of international law abiding within the haze of custom are at least well enough explored that their essential natures remain only vaguely mysterious. With respect to IHL, this haze has partly been dissipated by explicit codification in the Geneva Conventions.¹⁹ But accompanying this fairly well-defined body of law there lurk taboos murkily defined even by the standards of customary international law (CIL): other-than-grave breaches. They are described almost entirely in the negative, which is to say by what they are not. Like a cameo, simple breaches are defined in relief. It thus makes sense to begin by defining the contents of the category comprising the most serious offenses: grave breaches. Given the emphasis placed on this category, “[i]t is, perhaps easier,” admitted Christopher

17. Positivism has been described as “summariz[ing] a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.” Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291, 293 (1999). In other words, international law is, according to positivists, only that which is “on the books.”

18. C. Lamb, Commentary, *Repressions of Violations Part V: Enforcement and Application*, 9 AUSTL. Y.B. INT’L L. 341, 341 (1980).

19. IHL also comprises several other treaties and a significant body of custom. See generally ICRC, *What Is International Humanitarian Law?* (July 31, 2004), http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (describing the constituents of IHL and enumerating its noteworthy instantiations).

Lamb of the Australian Red Cross, "to speak of grave breaches than simply breaches."²⁰

Nevertheless, a brief survey of the entire field of breaches is warranted. Although nongrave breaches are defined mostly in relief, it's important to understand that they are carved from a certain finite universe of norms.

The Geneva Conventions and the Additional Protocols spell out the bulk of the legal strictures to which the conduct of warfare must conform (that is, *jus in bello*).²¹ Each Convention relates to a particular subject matter, each of which corresponds to a specific class of persons and property protected by that particular Convention and prescribes the rules for the treatment of that class. These classes of persons are, in the order of the Conventions: wounded and sick members of armed forces in the field;²² wounded, sick, and shipwrecked members of armed forces at sea;²³ prisoners of war;²⁴ and civilians.²⁵ Additional Protocol I is addressed more broadly to the treatment of victims of international armed conflict (IAC), which means all the classes of persons covered by the original conventions.²⁶

Beyond those categories of protected persons, the Conventions' prescriptions span an ample gamut of activity, including, but not limited to, the requirement of due process to protected persons under the power of a state party,²⁷ conditions for confining protected persons,²⁸ care for the bodies of the deceased,²⁹ the requirement to provide free passage for medical supplies,³⁰ the forbiddance of certain targets,³¹ restrictions on the

20. Lamb, *supra* note 18, at 341.

21. Numerous other agreements also restrict aspects of warfare such as the kinds of weapons permitted. See, e.g., Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

22. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

23. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II].

24. Geneva Convention III, *supra* note 3.

25. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

26. Additional Protocol I, *supra* note 4.

27. Geneva Convention I, *supra* note 22, art. 3; Geneva Convention II, *supra* note 23, art. 50; Geneva Convention III, *supra* note 3, art. 129; Geneva Convention IV, *supra* note 26, art. 146.

28. Additional Protocol I, *supra* note 4, art. 85.

29. See, e.g., Geneva Convention III, *supra* note 3, art. 120.

30. Additional Protocol I, *supra* note 4, art. 69.

31. *Id.* art. 85.

use of the protected emblems,³² the proscription of perfidy,³³ and the administration of occupied areas.³⁴

It's also important to note that, as *jus in bello*, the grave-breaches regime is a body of law that applies exclusively to combatants and their superiors during armed conflict. This is a vital consideration in any discussion of grave breaches or of the Conventions' prescribed duty to suppress all violations because the grave-breaches regime does not contemplate compliance by states with the implementation requirements of the Geneva Conventions. Thus, although a total failure to undertake *any* measures to suppress breaches of the Conventions might be a material breach according to the VCLT,³⁵ it is not (and cannot be) itself a grave breach. Nor does the literature describe a state's failure to search for and prosecute those accused of grave breaches as a grave breach itself. Such violation may still result in state responsibility for an international wrong, but it is not the same as a violation of the law of war.³⁶ On a related point, if there is no armed conflict, there can be no grave breach.³⁷ And because the grave-breaches regime applies only to international armed conflict (IAC), this places an additional requirement on the finding that a grave breach has occurred.³⁸ These distinctions should always be borne in mind.

These details provide a rough conversance with the outer perimeter of what constitutes a breach of the Geneva Conventions. The Geneva Conventions do not, however, define "minor breaches," per se, or describe any violation as "minor" or "simple." This is, perhaps, an unsurprising omission. Given that the Geneva Conventions are intended to address the most egregious violations arising from the most unavoidably uncivilized of all systemic human practices—namely, war—the finer details of those offenses not rising to the critical threshold of "grave" hardly seem of great consequence. One might fairly question whether there can even be a "minor" crime in this context.³⁹ It is this omission that requires resort to the enumerated grave breaches.

Several of the grave breaches of the Conventions and Additional Protocol I are expressly laid out as such and are therefore, without qualification, grave per se. Each of the Geneva Conventions defines as grave breaches "willful killing, torture or inhuman treatment, including biologi-

32. *Id.* art. 38.

33. *Id.* art. 37.

34. *See, e.g.*, Geneva Convention I, *supra* note 22, art. 18.

35. *See* VCLT, *supra* note 16, art. 60.

36. RATNER, *supra* note 12, at 374-75.

37. *Id.*

38. *Id.* at 375 ("The grave breaches provisions only apply in international armed conflicts; and they only apply to acts against so-called protected persons or during battlefield activities."). Needless to say, this means that some very grave breaches indeed (in the colloquial sense) may simply be defined away by the nature of the armed conflict.

39. *See, e.g.*, Yves Sandoz, *The History of the Grave Breaches Regime*, 7 J. INT'L CRIM. JUST. 657, 676 (2009) ("In short, it should not be possible to speak as one author did, of 'minor war crimes.'" (footnote omitted)).

cal experiments, willfully causing great suffering [and] serious injury to body or health.”⁴⁰ Beyond this general prohibition, the Conventions also classify as grave certain other breaches coinciding with the respective purpose of each Convention. Thus, the First, Second, and Fourth Geneva Conventions (Geneva Conventions I, II, and IV, respectively) forbid “extensive destruction and appropriation of property, not justified by military necessity⁴¹ and carried out unlawfully and wantonly,”⁴² and the Third Geneva Convention (Geneva Convention III) names “compelling a prisoner of war [POW] to serve in the forces of the hostile Power [and] willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention” as grave breaches.⁴³ This includes subjecting protected persons to “physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.”⁴⁴

40. See Geneva Convention I, *supra* note 22, art. 50; Geneva Convention II, *supra* note 23, art. 51; Geneva Convention III, *supra* note 3, art. 130; Geneva Convention IV, *supra* note 26, art. 147.

41. “Military necessity” is defined as a “principle of warfare allowing coercive force to achieve a desired end, as long as the force used is not more than is called for by the situation.” BLACK’S LAW DICTIONARY 1083 (9th ed. 2009). Although the absence of military necessity seems to be an essential element of a grave breach arising under these articles, military necessity is inherently proportional; destruction or appropriation so grossly disproportionate to the advantage gained means that military necessity alone cannot be an affirmative defense, notwithstanding the permissive understanding of necessity in this legal discipline as compared to others, such as tort or criminal law.

42. See Geneva Convention I, *supra* note 22, art. 50; Geneva Convention II, *supra* note 23, art. 51; Geneva Convention IV, *supra* note 26, art. 147.

43. Geneva Convention III, *supra* note 3, art. 130. Geneva Convention III also specifies that “[a]ny unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a *serious breach*.” Geneva Convention III, *supra* note 3, art. 13 (emphasis added). This is the sole instance in the Conventions of reference to “serious breach,” but the commentators are in nearly universal agreement that there is no distinction between these and those breaches considered to be “grave.” See, e.g., Flores, *supra* note 6, at 264-65 (“Grave breaches, sometimes called ‘serious violations,’ are those which most seriously prejudice the basic interests protected by humanitarian law.”) (footnotes omitted). But cf. Toni Pfanner, *Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims*, 91 INT’L REV. RED CROSS 279, 285 n.34 (2009) (“However, the expression ‘serious violation’ is to be taken in the ordinary sense, which is left to the [appreciation of the International Fact-Finding] Commission [established by Additional Protocol I].”).

44. Geneva Convention III, *supra* note 3, art. 13. These are among those affronts described as “serious violations.” Note also the clause that follows: “Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.” The “[l]ikewise,” however, seems to refer only to the absolute character of the prohibition, but does not necessarily import to that prohibition the label of “serious violation.” Thus, one fair reading of this clause is that it does not spell out grave breaches. Nevertheless, M. Pictet, for one, interpreted these offenses as falling within the meaning of “inhumane treatment,” which is itself a grave breach. See PICTET, *supra* note 10, at 137. M. Pictet, of course, was not a state party to the Conventions, so despite his authority, it is unclear whether his broad view of inhumanity has prevailed.

Additional Protocol I clarifies that the category of grave breaches includes “unjustified” acts and omissions that endanger the physical and mental health of protected persons in the power of an enemy belligerent.⁴⁵ Hence, “it is prohibited to subject [protected persons] to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards”⁴⁶ But Additional Protocol I didn’t merely clarify the standard for discerning grave breaches described in the Conventions.

Beyond a merely exegetical fleshing out of this category of prohibitions, Additional Protocol I sets forth a broad expansion of this class of conduct by adding to the list of *per se* grave breaches: removal of tissue and organs for transplantation except as medically necessary for the protected person;⁴⁷ transfer of civilian populations from the occupying state into an occupied territory;⁴⁸ transfer or deportation of civilians within or outside the occupied territory;⁴⁹ unjustifiable delay in the repatriation of protected persons;⁵⁰ practices of apartheid and other degrading treatment based on racial discrimination;⁵¹ and targeting and causing the destruction of historic cultural monuments.⁵² There can be no “minor breach” arising under any of these provisions.

Breaches that are nongrave by virtue of falling outside these provisions include, for example, the use of mass graves or failure to mark the graves of enemy combatants.⁵³ Similarly, exposing POWs to public display and humiliation (as well as other “outrages upon personal dignity”)⁵⁴ may fail to satisfy this test, provided such conduct is not subsumed by the category of “inhuman treatment.”⁵⁵

45. Additional Protocol I, *supra* note 4, art. 11.

46. *Id.* Even consent of the protected person is no defense for “(a) Physical mutilations; (b) Medical or scientific experiments;” and “(c) Removal of tissue or organs for transplantation, except where these acts are justified [by accepted medical standards].” *Id.*

47. *Id.*

48. *Id.* art. 85(4)(a).

49. *Id.*

50. *Id.* art. 85(4)(b).

51. *Id.* art. 85(4)(c).

52. *Id.* art. 85(4)(d). Professor Ratner also provides a pithy list of grave breaches “in its totality.” RATNER, *supra* note 12, at 374. I would take modest issue with some of Professor Ratner’s characterizations in the latter class (for instance, he names “perfidious use of the Red Cross or Red Crescent emblem,” *id.*, as a grave breach without reference to Additional Protocol I’s qualification of “death or serious injury to body or health,” Additional Protocol I, *supra* note 4, art. 85), but his list is otherwise good shorthand for the grave breaches. For an argument that the crime of perfidy ought to be a *per se* grave breach, see Byron D. Greene, *Bridging the Gap that Exists for War Crimes of Perfidy*, ARMY LAW, Aug. 2010, at 45, 50-52. See discussion *infra* pp. 161.

53. See, e.g., Geneva Convention I, *supra* note 22, art. 17.

54. Geneva Convention III, *supra* note 3, art. 3.

55. *Id.*, art. 13. There is a possible, though not entirely convincing, construction of this article that would define this manner of POW abuse as a grave breach. The clause forbidding POW abuse of this kind appears in an article that explicitly lays out a number of grave breaches. See *id.*, art. 130. And although a provision of law can surely be known by the

There are additionally those breaches, described in Additional Protocol I, that are grave as a result of the interaction between their forbidden character and the gravity of the harm caused. These breaches are qualified by the phrase “causing death or serious injury to body or health.”⁵⁶ For example, the crime of perfidy—that is, feigning the intent to surrender, feigning incapacitation, feigning noncombatant status, or feigning protected status by use of a protected emblem—is a “minor breach” where it leads only to military advantage, but grave if it leads to death or serious injury.⁵⁷ Targeting civilian areas with nonlethal chemical weapons to effect their submission would also likely fall within this lesser category.⁵⁸

Notice that these outcome-determined grave breaches also contain a causation requirement. It would therefore be insufficient that one of these enumerated infractions coincides with death or serious injury. Rather, the death or serious injury must be caused by the violation. This has potentially serious implications for how states treat actors perceived to be in continual or flagrant violation of the Geneva Conventions.⁵⁹

The contributions of Additional Protocol I to the grave breaches regime cannot be viewed as mere window dressing. They are substantive. Though these proscriptions honor (indeed celebrate) the spirit of the origi-

company it keeps, there is nothing specifically to tie this clause to the “serious breaches” listed alongside it. As such, I have adopted the more reserved reading.

56. Additional Protocol I, *supra* note 4, art. 85. These breaches, as with all breaches, are additionally qualified as applying only to persons eligible for the protections of the Conventions. However, this qualification was essentially rendered a nullity by the terms of Additional Protocol I. *Id. art. 44* (“A combatant who [fails] to meet the requirements [of the Conventions] shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.”). Hence, this qualification is meaningful only to those states—such as the United States, Israel, Iran, and a handful of others—that have not ratified Additional Protocol I.

57. *Id.* arts. 37, 85.

58. *Id.* art. 85. These “outcome-specific” grave breaches are, in their entirety,

- “(a) Making the civilian population or individual civilians the object of attack;
- (b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . ;
- (c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . ;
- (d) Making non-defended localities and demilitarized zones the object of attack;
- (e) Making a person the object of attack in the knowledge that he is hors de combat;
- (f) The perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.”

Id.

59. See discussion *infra* Part IV.

nal Conventions, Additional Protocol I swept within the ambit of the grave-breaches regime many of the earlier Conventions' simple breaches, thereby shrinking the latter category of violations.⁶⁰ This was unquestionably the intent. What, one might then ask, is left of minor breaches?

Because most of the grave breaches listed in Additional Protocol I require that the conduct in question cause "death or serious injury to body or health,"⁶¹ this leaves to the classification of simple breaches any willful violation therein listed that fails to cause "death or serious injury to body or health."⁶² By carefully circumscribing a particular subset of offenses, the set of residual violations (that is, nongrave breaches) is left wide open.⁶³

60. This principled expansion was coupled with an explicit change in the protections afforded to parties who—like terrorists and other irregular combatants—systematically deviate from the law of war. See Additional Protocol I, *supra* note 4, art. 44 ("While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war . . ."). It came at a price. Though the United States signed all three Additional Protocols, it has never formally ratified Additional Protocols I and II. The importance of this fact cannot (and should not) be understated, despite the self-conscious blushing of American legal scholars hoping not to evince a parochial bias. As one of the states providing the impetus for the Geneva Conventions following World War II, the United States rarely misses an opportunity to tout its special role in the codification of liberal international regimes like the Geneva Conventions. See, e.g., PRESIDENT'S MESSAGE TO THE SENATE TRANSMITTING A PROTOCOL TO THE 1949 GENEVA CONVENTIONS, 1 PUB. PAPERS 1987-88 (Jan. 29, 1987) reprinted in 81 AM. J. INT'L L. 910, 910 [hereinafter Reagan Letter] ("The United States has traditionally been in the forefront of efforts to codify and improve international rules of humanitarian law in armed conflict. . ."). Nevertheless, it would be a mistake to confuse a liberal tendency with a rejection of the calculus of *realpolitik*. With respect to the first two Additional Protocols, the United States has shown a decided preference for the status quo ante, and this seems a situation unlikely to change in the near future.

61. Additional Protocol I, *supra* note 4, art. 85.

62. *Id.* The Conventions and Additional Protocol I also specify particular mental states and mental-state-like qualifiers, including "willfully," "unlawfully," "wantonly," and "without justification." *Id.* Thus, it is difficult to say with certainty whether violations lacking willfulness (or some other mental state) are minor breaches or whether such violations are not breaches at all. For ease of analysis, I assume the latter; because certain mental states are codified, I have assumed that these are elements of the breaches themselves rather than assume that they are elements contributing to the graveness of a given breach. This is a somewhat arbitrary choice, though, so it would be worth giving further consideration to the import of *mens rea* in this regard. See generally Marko Divac ?berg, *The Absorption of Grave Breaches into War Crimes Law*, 91 INT'L REV. RED CROSS 163, 173-74 (2009).

63. I would readily concede that this formulation can be seen as a question of framing or perspective; think of the often-invoked image of two faces that can alternatively be viewed as a vase. But in many instances it would be hard to imagine how this circumscription limits the category of simple breaches in quite the manner that it does grave breaches. Although any willful breach of an enumerated proscription that results in death or serious injury is grave according to Additional Protocol I, this limitation is one only of ends and not of means. That being said, the nature of some of the violations is such that it may be difficult to envisage their perpetration in such a way that would not be likely to result in death or serious injury. In yet other situations, violations cannot possibly meet this higher threshold; after all, some proscriptions relate to the remains of the dead. Nevertheless, I think this formulation is most correct in that the grave breaches are defined (which is inherently narrowing) while the

For states bound to the original Conventions without the augmentation of Additional Protocol I,⁶⁴ there remains an even wider gap through which to drag the net of simple breaches. Specifically enumerated prohibitions notwithstanding, the original Geneva Conventions conceptually highlight two basic classes of conduct as grave breaches. As noted above, “if committed against persons or property protected by the convention,”⁶⁵ grave breaches are those that “caus[e] great suffering or serious injury to body or health”⁶⁶ and those entailing “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”⁶⁷ As with the residuum from the grave breaches of Additional Protocol I, the remainder here are minor breaches.⁶⁸

In short, the field of nongrave breaches is as broad as it is poorly defined. The Geneva Conventions require of all High Contracting Parties to take all necessary measures to suppress even other-than-grave breaches.⁶⁹ But the method of suppression is not prescribed. And universal jurisdiction will not lie for breaches that aren’t grave. The next question, then, must address the nature of the obligation imposed on High Contracting Parties by the Geneva Conventions’ requirement to “take measures necessary for the suppression of all” breaches. And, as we have seen, this must be done at least in part by resort to subsequent state practice.⁷⁰

II. HOW STATES PARTIES SUPPRESS ALL OTHER BREACHES

Complementing the universal jurisdiction of states parties over grave breaches is the duty “to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of” the

undefined residuum of nongrave breaches are not. I think this formulation is also most consonant with the intent of the drafters, who wished to have only a narrow category of breaches defined as grave.

64. The Additional Protocols amended Convention obligations but only for states parties to the Additional Protocols. See ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 15-Nov-2012*, ICRC (Nov. 15, 2012), [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf), for a list of states that are parties to Additional Protocol I.

65. This qualifier was all but written out of Additional Protocol I by the designation of any combatant as a POW, and the presumption of POW status for anyone falling into the hands of the adverse power and claiming such status. Additional Protocol I, *supra* note 4, art. 44, 45.

66. Geneva Convention I, *supra* note 22, art. 50; Geneva Convention II, *supra* note 23, art. 51; Geneva Convention III, *supra* note 3, art. 130; Geneva Convention IV, *supra* note 26, art. 147.

67. Geneva Convention I, *supra* note 22, art. 50; Geneva Convention II, *supra* note 23, art. 51; Geneva Convention IV, *supra* note 26, art. 147.

68. Geneva Convention I, *supra* note 22, art. 50; Geneva Convention II, *supra* note 23, art. 51; Geneva Convention III, *supra* note 3, art. 130; Geneva Convention IV, *supra* note 26, art. 147.

69. Geneva Convention I, *supra* note 22, art. 49; Geneva Convention II, *supra* note 23, art. 50; Geneva Convention III, *supra* note 3, art. 129; Geneva Convention IV, *supra* note 26, art. 146.

70. VCLT, *supra* note 16, at art. 31.

Geneva Conventions.⁷¹ Falling under this same heading of “Repression of Abuses and Infractions,” states parties commit “to take all measures necessary for the suppression of all acts contrary to” the Geneva Conventions.⁷² This is sometimes referred to as a distinction of suppression versus repression and prevention.⁷³ But the true distinction is not so semantic as that. In Article 52 of Geneva Convention I, for example, states parties are obliged to repress *any* alleged violation of the Convention “with the least possible delay.”⁷⁴ The real distinction seems to be the apparent discretion given to suppress nongrave breaches, whereas grave breaches must be repressed and prevented specifically through legislation of penal sanctions.⁷⁵ How states exercise this discretion constitutes state practice with respect to minor breaches.

These practices are highly variable, ranging from the criminalization of all breaches of IHL and the Geneva Conventions⁷⁶ to the provision in military regulations for administrative or disciplinary sanction.⁷⁷ This probably represents nearly the whole spectrum of reasonable interpretations of this duty.⁷⁸ The ICRC—whose views in this area are traditionally

71. Geneva Convention I, *supra* note 22, art. 49; Geneva Convention II, *supra* note 23, art. 50; Geneva Convention III, *supra* note 3, art. 129; Geneva Convention IV, *supra* note 26, art. 146.

72. Geneva Convention I, *supra* note 22, art. 49; Geneva Convention II, *supra* note 23, art. 50; Geneva Convention III, *supra* note 3, art. 129; Geneva Convention IV, *supra* note 26, art. 146.

73. See, e.g., Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 27 (1984) (noting the similarity of the two phrases while suggesting that “repression,” as used in the Geneva Conventions, “appears to demand the imposition of penal punishment, whereas suppression of other than grave breaches connotes utilization of administrative and disciplinary measures as well as penal sanctions for the prevention and punishment of simple breaches.”). M. Pictet, however, suggests that there is no clear distinction; while describing the negotiations with respect to these very words and the different phrases chosen for the French and English texts, he goes on to define the “primary purpose of the paragraph” referring to suppression (in the English text) as “the repression of infractions other than ‘grave breaches’” PICTET, *supra* note 10, at 367.

74. Geneva Convention I, *supra* note 22, art. 52; Geneva Convention II, *supra* note 23, art. 53; Geneva Convention III, *supra* note 3, art. 132; Geneva Convention IV, *supra* note 26, art. 149.

75. States parties to the Geneva Conventions are also required to enact legislation adequate to prevent and repress any abuses of the protected “distinctive signs” established under the Conventions, despite the fact that their abuse constitutes a grave breach only if it results in death, injury, or damage to property. Geneva Convention II, *supra* note 23, art. 45.

76. Ireland’s Geneva Conventions Act of 1962 is such an exception. Geneva Conventions Act, 1962, (Act No. 11/1962) (Ir.), available at <http://www.irishstatutebook.ie/1962/en/act/pub/0011/print.html>.

77. HEADQUARTERS DEPARTMENTS OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE MARINE CORPS, ARMY REGULATION 190–8, OPNAVINST 3461.6, AFJI 31–304, MCO 3461.1, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1997) [hereinafter U.S. MILITARY DETENTION REGULATIONS].

78. More stringent measures are not, however, unimaginable. A state might adopt legislation providing for universal jurisdiction over all breaches of the Geneva Conventions, though this would likely be quite controversial. For an example of the sorts of controversy

given a great deal of respect⁷⁹—has adopted M. Pictet's view in its Model Geneva Conventions Act (Model Act).⁸⁰ Section 4 of the Model Act, entitled "Punishment of other breaches of the Conventions and Protocols," provides that

- (1) Any person, whatever his or her nationality, who, in [INSERT COUNTRY NAME], commits, or aids, abets or procures any other person to commit, a breach of any of the Conventions or Protocols not covered by section 3,⁸¹ is guilty of an indictable offence.
- (2) Any national of [INSERT COUNTRY NAME] who, outside [INSERT COUNTRY NAME], commits, or aids, abets or procures the commission by another person of a breach of any of the Conventions or Protocols not covered by section 3 is guilty of an indictable offence.⁸²

Although some authorities have suggested that this approach is a "modern tendency,"⁸³ there are relatively few states that have expressly adopted statutory language as specific as the Model Act on this point. Thus, despite what the ICRC and its commentators imagine (or wish) the requirement

aroused by states implementing ambitious universal jurisdiction regimes, see Steven Ratner, *Belgium's War Crimes Statute: A Post-Mortem*, 97 AM. J. INT'L L. 888 (2003). But on the opposite end of the spectrum, it is somewhat more difficult to imagine more lax steps taken for an accused combatant than those typically described as administrative or disciplinary. Still, I won't foreclose the possibility. But given my own experience in the military, I will assume that administrative or disciplinary measures without penal sanction represent the lower limits of reasonableness.

79. See generally David P. Forsythe, 30 INT'L ORG. 607, *The Red Cross As Transnational Movement: Conserving and Changing the Nation-State System* (1976) (describing the historical functions of the ICRC, its special role in international law, and the respect it is accorded in this area). See also Yvez Sandoz, *The Int'l Comm. of the Red Cross as Guardian of Int'l Humanitarian Law*, ICRC RESOURCE CENTRE (Dec. 31, 1998), <http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm>; Geneva Convention I, *supra* note 22, art. 3 (referring to the ICRC as an "impartial humanitarian body").

80. ICRC, *Model Law: Geneva Conventions (Consolidations) Act* (for Common Law States) §§ 3–4 (2008) available at http://www.icrc.org/eng/assets/files/other/model_law_gc-ap-i-ii-iii.pdf [hereinafter *Model Act*].

81. Part III covers punishment of grave breaches.

82. *Model Act*, *supra* note 80, §4.

83. Alexandre Faite & Umesh Kadam, *Implementation of International Humanitarian Law in Japan: The ICRC Perspectives*, GENEVA ACADEMY (2005), http://www.geneva-academy.ch/RULAC/pdf_state/ICRC-perspective.pdf. Some commentators are less sanguine about this "tendency." Yasmin Naqvi, for instance, in praising the Model Geneva Conventions Act, notes that "[w]hereas many existing Geneva Convention Acts draw a procedural distinction between the treatment of grave breaches . . . and other breaches, the Model Act treats all breaches in the same fashion and imposes maximum penalties." Yasmin Naqvi, *Books and review: "Punishing Violations of International Humanitarian Law at the National Level: A Guide for Common Law States," INT'L REV. RED CROSS*, Jun. 30, 2002 (book review). The Model Act is then, like much model legislation relating to international law, *lex ferenda* as opposed to *lex lata*.

to be, state practice lends little support to an expectation that states parties are required affirmatively to legislate in this area.

For instance, the United States—which, for its part, has a stated policy of treating any violation of IHL as “war crime”⁸⁴—has only affirmatively legislated with respect to a discrete set of statutorily defined war crimes, which includes grave breaches of the Geneva Conventions.⁸⁵ The United States also goes so far as defining as grave certain violations of Common Article 3, despite the fact that the prohibitions of Common Article 3 do not formally fall within the grave-breaches regime.⁸⁶

Much less common are states that affirmatively criminalize nongrave breaches. One well-known example of this is Ireland.⁸⁷ The Irish Geneva Conventions Act makes the commission of any minor breach by any Irish citizen anywhere or by a noncitizen in Ireland a criminal offense.⁸⁸ The act then defines a “minor breach” as

- (a) contravention of a provision of any of the Scheduled Conventions or of Protocol I which is not any such grave breach of that Convention or that Protocol as is mentioned in the relevant Article thereof referred to in section 3 of this Act, or
- (b) a contravention of Protocol II.⁸⁹

Other Anglophone states like Australia⁹⁰ and Canada,⁹¹ have, like the United States, specifically criminalized only grave breaches. Many of these states have also passed laws and regulations to provide for the prevention and repression of misuse of protected emblems (such as the red cross and red crescent);⁹² depending on the outcome of the anticipated misuse, these sorts of regulations can be understood as taking express aim at nongrave breaches.⁹³

Thus, although most states have passed legislation criminalizing grave breaches, few have gone farther and addressed nongrave breaches.⁹⁴ Of

84. RATNER, *supra* note 12, at 375.

85. War Crimes Act of 1996, 18 U.S.C.A. § 2441(c)(1) (2006).

86. *Id.*

87. Geneva Conventions Act, 1962, (Act No. 11/1962) (Ir.), available at <http://www.irishstatutebook.ie/1962/en/act/pub/0011/print.html>.

88. Ireland’s Geneva Conventions Act of 1962 is such an exception. *Id.*

89. *Id.*

90. *Geneva Conventions Act 1957* (Austl.).

91. Geneva Conventions Act, R.S.C. 1985, c. G-3 (Can.).

92. ICRC, *National implementation of International Humanitarian Law: Biannual Update on National Legislation and Case Law, July–December 2004*, 87 INT’L REV. RED CROSS 217, 218-19 (2005).

93. Of course, as discussed *supra* note 74, this is required of the Conventions. Geneva Convention II, *supra* note 23, art. 50. And as alluded to *infra* Part IV, this may be the most efficient way of regulating conduct that can quite readily overcome the grave breach threshold.

94. For a comprehensive list of legislative enactments by states relating to war crimes and detailing how grave breaches of the Geneva Conventions have been implemented do-

those few, most have simply inserted language into their military regulations.⁹⁵

In the face of such variable state practice, it is difficult to maintain that states parties to the Geneva Conventions understand their burden as M. Pictet did.⁹⁶ Although the ICRC has a certain degree of moral authority in interpreting IHL, its normative preference is, at the very least, not shared by the states, which are the genesis of international law.

But setting aside for a moment the normative desirability of addressing all breaches legislatively, there remains the question *why* the text of the Geneva Conventions and Additional Protocol I ought to be read as requiring domestic legislation to suppress nongrave breaches in the first place. The VCLT places a premium on the “ordinary meaning” of a treaty’s terms.⁹⁷ And whereas the Geneva Conventions’ terms make clear that domestic legislation is necessary to repress grave breaches, this clarity is absent with respect to all other breaches. This fact, working in combination with the VCLT’s prescribed reliance on subsequent practice, makes the ICRC’s claim in this regard somewhat dubious. What, then, does the duty to suppress “really” mean? The next Part addresses this question.

III. THE “REAL” MEANING OF THE DUTY TO SUPPRESS ALL OTHER BREACHES

Understanding the lay of the land with regard to nongrave breaches does not require only a rough description of that category’s features and a broad view of state practice—or the lack of state practice—pertaining to those breaches. There is also the question of what the Geneva Conventions and Additional Protocol I were actually intended to require of states. State practice being largely negative, the discussion above suggests something about what the duty is *not*. If there is a true obligation, however (a

mestically, see Int’l Comm. Of the Red Cross, *Practice Relating to Rule 156: Definition of War Crimes*, ICRC RESOURCE CENTRE, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule156.

95. The U.S. military, for instance, can make use of very general statutory language in the Uniform Code of Military Justice to punish virtually any imaginable infraction, 10 U.S.C. § 934 art. 134 (1956) (“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”). Specific regulation of conduct contrary to the law of war other than grave breaches is left to lower-level regulation and standing orders, the contravention of which are grounds for disciplinary action. 10 U.S.C. §892, art. 92 (1956) (“Any person subject to this chapter who— (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.”). For a comprehensive list of military regulations states have enacted to proscribe war crimes, see ICRC, *supra* note 94.

96. PICTET, *supra* note 10, at 368.

97. VCLT, *supra* note 16, art. 31.

question whose answer is debatable), divining it means turning to the standard tools of the trade for international legal interpretation.

The Vienna Convention on the Law of Treaties is the primary instrument governing the interpretation of an international agreement. The VCLT has two primary provisions governing interpretation: Articles 31 and 32, which are labeled "General rule of interpretation" and "Supplementary means of interpretation," respectively.⁹⁸

Article 31 first explains that "[a] treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to [its] terms . . . in their context and in light of its object and purpose."⁹⁹ That article then defines a treaty's "context" by enumerating, in addition to the agreement's full text,¹⁰⁰ "[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "[a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." It goes on to provide that three other factors "shall be taken into account, together with the context."¹⁰¹ Those factors are,

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.¹⁰²

Finally, Article 31 declares that "[a] special meaning shall be given to a term if it is established that the parties so intended."¹⁰³

The VCLT also provides for "recourse to . . . supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."¹⁰⁴ This is the function of Article 32. The resort to such means is permitted either to "confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous

98. *Id.* arts. 31–32.

99. *Id.* art. 31.

100. ". . . including its preamble and annexes." *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* art. 32. This provision provides the justification for a pervasive hostility toward such supplemental means of interpretation in international law. Although such hostility may be overstated, *see* Julian Mortenson, *The Travaux of Travaux: A History of the Rules of Treaty Interpretation* (Working Paper), I will proceed according to the prevalent understanding with respect to these means.

or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”¹⁰⁵

Thus, the accepted way of finding the meaning of the treaty obligation to “suppress[] all acts contrary to the provisions of the” Geneva Conventions “other than the grave breaches” is to feed through the VCLT’s interpretative machinery the provision from which that obligation springs. Although this obligation stems from a different article in each of the Geneva Conventions, the operative text is the same in each: “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”¹⁰⁶ Of the Additional Protocols, only Additional Protocol I speaks to “the repression of breaches” as distinct from grave breaches or, for that matter, of grave breaches at all.¹⁰⁷ It expressly incorporates the requirement from the Geneva Conventions and declares that requirement to apply to breaches and grave breaches of the Additional Protocol.¹⁰⁸ In other words, Additional Protocol I, although it lengthens the list of grave breaches considerably, provides no further guidance as to nature of the requirement to suppress simple breaches.

As a matter of fact, Additional Protocol I only muddies the waters further with its Article 87, which addresses the duties of commanders “to prevent and, where necessary, to suppress and to report” grave breaches committed by their subordinates.¹⁰⁹ To this end, “High Contracting Parties to the conflict shall require that . . . commanders ensure that [those] under their command are aware of their obligations under the Conventions and [Additional Protocol I].”¹¹⁰ Further, Article 87 dictates that

High Contracting Parties and Parties to the conflict shall require any commander who is aware that [those under his command] are going to commit or have committed a breach . . . to initiate such steps as are necessary to prevent such violations of the Conventions or [Additional Protocol I], and, where appropriate, to initiate disciplinary or penal action against violators thereof.¹¹¹

This article perpetuates the obscure nature of the state’s duty in three important ways. First, it still does not clarify what manner of mechanism states are expected to use in placing these requirements on their commanders. Second, the article makes clear that either “disciplinary or penal

105. VCLT, *supra* note 16, art. 32.

106. Geneva Convention I, *supra* note 22, art. 49; Geneva Convention II, *supra* note 23, art. 50; Geneva Convention III, *supra* note 3, art. 129; Geneva Convention IV, *supra* note 26, art. 146.

107. Only Additional Protocol I applies to armed conflicts of an international character, so the restriction of the grave breaches framework to international armed conflict (IAC) excludes the other Additional Protocols. Additional Protocol I, *supra* note 4, art. 85

108. *Id.*

109. *Id.* art. 87.

110. *Id.*

111. *Id.*

action against violators” is appropriate, and nonpenal disciplinary action to be taken against members of the armed forces is not typically codified through a formal legislative process.¹¹² But perhaps most confounding is that the word “suppress” as used here seems by its context to be purely responsive to already-completed or ongoing breaches, whereas the Geneva Conventions give the distinct impression that suppression and repression are intended to apply not only retrospectively but also prospectively. So although “suppress” and “repress” are used almost interchangeably in the earlier Conventions and presumably include any actions taken by a state to prevent, discourage, or halt breaches, Article 87 makes these words—which are already the source of ambiguity—less clear still.

In short, whatever interpretation one reaches in examining the duty to suppress all breaches of the Geneva Conventions, Additional Protocol I does nothing to clarify or confirm that interpretation. This leaves as the only sensible point of attack the duty as it appears in the Conventions themselves.

The first thing to note when applying the method prescribed by the VCLT is that the Geneva Conventions have something to say about High Contracting Parties legislating with regard to violations of the Conventions. The Conventions each require states parties “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the” Geneva Conventions.¹¹³ As to “the suppression of all acts contrary to the provisions of the” Geneva Conventions, however, they are silent on the matters of legislation and penal sanctions. And by the familiar interpretative maxim of *expressio unius est exclusio alterius*,¹¹⁴ the “ordinary meaning” of the treaty’s terms—the primary interpretative tool under the VCLT¹¹⁵—expresses an intent that such measures not be required.

Turning to the “context” of the Geneva Conventions—that is, other agreements or instruments, among all the parties, made “in connection with the conclusion of the treaty”¹¹⁶—only the other Geneva Conventions satisfy the definition. And because each Convention uses the same phrasing, relying on this as context produces mere tautology. The object and purpose of the Geneva Conventions might provide a little more basis on which to rest an assumption of a legislative requirement. But even supposing that the object and purpose of the Geneva Conventions is as broad as

112. *Id.*

113. Geneva Convention I, *supra* note 22, art. 49; Geneva Convention II, *supra* note 23, art. 50; Geneva Convention III, *supra* note 3, art. 129; Geneva Convention IV, *supra* note 26, art. 146.

114. This is a standard rule of interpretation meaning that the inclusion of certain language is intended to exclude language not provided.

115. *See* VCLT, *supra* note 16, art. 31.

116. *Id.*

ushering in an end to all “uncivilized” warfare,¹¹⁷ it cannot be said with any degree of certainty that the states parties imagined legislation to be the only acceptable way of achieving this goal.¹¹⁸ And even were there some slender ledge of object and purpose on which to hang such a supposition, its logic is belied by the states parties themselves, whose practices evince their understanding of the obligations imposed.

That state practice informs our understanding of a treaty’s meaning is a result of the additional factors enumerated by the VCLT as those that “shall be taken into account, together with the context.”¹¹⁹ The first—that of subsequent agreement regarding the interpretation or application of the treaty¹²⁰—can be satisfied only by the Additional Protocols. But, as described above, these Protocols do nothing to clarify this particular obligation.¹²¹ Moreover, whereas the underlying Conventions enjoy universal participation, the Additional Protocols do not.¹²² There is thus no purchase to be found in looking to subsequent agreements.

Subsequent practice,¹²³ however, is instructive. As described above, state practice on this matter displays a significant variety of views on what states find “necessary” to suppress nongrave breaches.¹²⁴ More importantly, much of that state practice flies in the face of a purported commitment by states parties to affirmatively legislate. These facts militate strongly against an understanding that requires such a commitment.

Finally, we may look to any relevant rules of international law as they pertain to the relationship between the parties.¹²⁵ Because the Geneva Conventions are universal, only universal norms among the parties can be germane. But universal norms like the U.N. Charter or the rules of cus-

117. PICTET, *supra* note 10 at 16. (“Should the disaster of a new war occur, [the Conventions] will be a safeguard for countless persons and the last refuge of civilization and humanity.”).

118. We might note that no “purpose” is provided in the Geneva Conventions save that “of revising the Convention[s] concluded at Geneva on July 27, 1929,” Geneva Convention I, *supra* note 22, pmbl., but one need not go so far to find the treaties’ actual object and purpose to be wanting if one is looking for an affirmative gesture toward a required method for suppressing all acts contrary to the Conventions. In any event, a treaty’s object and purpose need not be explicit in the text of the agreement. Although this is sometimes done, *see, e.g.*, Agreement on Extradition Between the European Union and the United States of America, U.S.-Eur. Union, art. 1, June 25, 2003, S. TREATY DOC. NO. 109-14 (providing that its object and purpose is “to provide for enhancements to cooperation and mutual legal assistance.”); Inter-American Convention Against Terrorism art. 1, June 3, 2002, S. TREATY DOC. NO. 107-18 (listing as its purpose the prevention, punishment, and elimination of terrorism), it often is not. So rejection of any object and purpose not expressed in a treaty’s terms would be to require an uncommon and stultifying exactitude.

119. VCLT, *supra* note 16, art. 31.

120. *Id.*

121. *See* discussion *supra* part II.

122. ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 15-Nov-2012*, *supra* note 64.

123. VCLT, *supra* note 16, art. 31.

124. *See supra* Part II.

125. VCLT, *supra* note 16, art. 31.

tomary international law have little to say in this regard. In fact, the prevailing understanding of customary international law, as famously put forth in the Lotus Case, provides that all things are permitted to states that are not forbidden to them.¹²⁶ Thus, even this avenue leads only back to the discretion of the states parties.

There are, additionally, the supplementary means of interpretation provided for in the VCLT.¹²⁷ But "to confirm the meaning resulting from the application of article 31" gives little assistance if that meaning is still contestable.¹²⁸ And I do not intend to suggest that any of the possible meanings for the duty to suppress grave breaches is "manifestly absurd or unreasonable."¹²⁹ That leaves only ambiguity or obscurity as justification for resort to supplementary means like *travaux préparatoires*. Admittedly, there is room for disagreement here, but given that the weight of evidence from the application of VCLT Article 31 suggests a single and unambiguous—albeit vague—standard, I will not explore these supplementary sources in any depth.

Thus, the understanding of M. Pictet and the ICRC notwithstanding, application of the VCLT's interpretative machinery suggests that the "nongrave breaches regime" is one that affords total discretion to states in determining what measures are in this sense "necessary."¹³⁰ That is to say that it is largely a permissive norm. The question, then, is what the implications of such a discretionary regime are.

IV. THE IMPLICATIONS OF THE CURRENT NONGRAVE-BREACHES REGIME

There is a sense in which it is easy to dismiss worries about how states choose to suppress nongrave breaches. As was earlier mentioned, some commentators have suggested that nongrave breaches simply do not rise to a level of gravity cognizable in a universal international regime.¹³¹ In fact, most (if not all) commentators have come to this conclusion with respect to at least some class of minor violation.¹³² But there is some sense in which the gravity of the offenses themselves is less important than how

126. See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

127. These include "the preparatory work of the treaty and the circumstances of its conclusion. . . ." VCLT, *supra* note 16, art. 32.

128. *Id.*

129. *Id.*

130. There is the additional question of what these provisions mean in monist states where treaties are self-executing. In such cases, no implementing legislation is necessary. It is not at all clear what that means when a treaty standard such as this provides such wide latitude. This is, in effect, the same as legislating the treaty's prohibitions, but it says nothing of the method of punishment. Given that *nullum poena sine lege* is as well-established a rule as *nullum crimen sine lege*, it seems evident that the state need still set out penalties before even self-executing prohibitions can have meaningful force.

131. See FLORES, *supra* note 6, at 266.

132. See, e.g., PICTET, *supra* note 10, at 370.

states understand their burden to suppress *all* breaches, irrespective of gravity.

First, there is the obvious problem of impunity. If even grave breaches are often met with something less than the full penal sanctions required by the Geneva Conventions (including impunity),¹³³ then it is quite probable that states (and more of them) are substantially more likely to flout their obligations with respect to minor violations—whether in the letter of their laws or in the pursuit and punishment of violators—where they have such broad discretion. This suggests a lacuna in the regime, or at least a blind spot. States do not typically take cognizance of minor breaches committed by foreign nationals in foreign territories, so there is a class of violator that enjoys impunity not only in their home states (from which extradition would be unusual)¹³⁴ but also throughout the globe.

This is doubly troubling, for the commentators are largely in agreement that even simple breaches can, if repeated, come to be classified as grave.¹³⁵ But this is strictly a function of the Additional Protocols and the Fact-Finding Commission.¹³⁶ No such mechanism exists to escalate the gravity of repeated nongrave breaches for states that are party only to the Conventions and not to the Additional Protocols. So while it is widely understood that there ought to be *some* way of recognizing the gravity of repeated violations that glide just below the grave-breach threshold, it is not at all clear how such transubstantiation is supposed to occur in many cases of this sort.

Another problem is the simple lack of uniformity. In some ways, a more stringent standard is a more exact standard, and a more permissive standard is less exact (or, to coin a legal term of art, *vague*). Permissive standards grant discretion, and discretion in the law typically serves a purpose. More discretion is desirable in circumstances that are best dealt with by localized or particularized procedures that are specially adapted to those circumstances.¹³⁷ Less discretion is appropriate in instances where

133. RATNER, *supra* note 12, at 376.

134. ICRC, *Practice Relating to Rule 161: International Cooperation in Criminal Proceedings - Section C. Extradition of Own Nationals*, ICRC RESOURCE CENTRE (2013), http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter44_rule161_sectionc.

135. CLAUDE PILLOUD ET. AL, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3621 (1987); *see also* Flores, *supra* note 6, at 266. It is interesting to note here that this assertion is made in the Commentary on the Additional Protocols where it explicates the meaning of Article 90 of Additional Protocol I, which constitutes the Fact-Finding Commission. The Commission must also distinguish between grave breaches and nongrave breaches, as it may only enquire into facts related to the former. The point being made in the Commentary is that there is play in the joints where nongrave breaches are repeatedly committed. But this structure and the language used in Additional Protocol I further militate against the notion that the states parties' obligations are procedurally the same with respect to these different classes of breaches. *See* Additional Protocol I, *supra* note 4, art. 90.

136. PILLOUD, *supra* note 135, ¶ 3621.

137. *See generally*, 63C AM. JUR. 2D *Public Officers and Employees* § 228 (explaining discretionary powers and duties versus ministerial powers and duties).

one would expect to find very little variance among jurisdictions and circumstances.¹³⁸

With regard to grave breaches, the Geneva Conventions leave very little discretion: states parties are to pass legislation necessary to ensure criminal sanctions are brought to bear against perpetrators of grave breaches. And if states are unable to prosecute and, where applicable, punish those accused of committing grave breaches, such accused are to be extradited to a state whose criminal justice system has the capacity to do so. This is despite the fact that states have, among other things, different propensities for aggression; different capabilities in carrying out warfare; different legislative, judicial, and penal systems; different enforcement capacities; different norms with respect to punishment; and different levels of *ex ante* compliance with the Conventions' legislative requirements. But these same differences abide no matter which genus of breach we discuss. So there should be something about the grave-breaches regime that counsels less discretion and greater uniformity.

Clearly, one factor involved is the gravity of the conduct proscribed. Related to this is the normative desirability of using the law to express the opprobrium of the international community toward these breaches in particular. Either of these distinctions might justify differential treatment for nongrave breaches. As to the former factor, simple breaches are plainly *considered* less grave. And as to the latter, treating all breaches as equal might dilute the expressive value of singling out a narrow field of violations for ultimate disapprobation. But whereas these distinctions justify different types and degrees of punishment and different kinds of adjudicative jurisdiction,¹³⁹ it is unclear how requiring states parties to legislate with respect to nongrave breaches in any way affects—let alone acts to the detriment of—these concerns.

Yet there are compelling reasons to desire uniformity in this area. The first, as mentioned above, is that there seems to be *some* vaguely defined (if not wholly undefined) point at which simple breaches have been repeated often enough that they transform into grave breaches.¹⁴⁰ If this is so, there is no way to monitor this metamorphosis except through the Fact-Finding Commission, which has jurisdiction only where states ratified Additional Protocol I.¹⁴¹ This also means that some grave breaches born through this repetitive, cumulative process are likely to go unpunished (if not totally unregulated).

Another argument for uniformity is that a uniform requirement to legislate regarding nongrave breaches is more amenable to monitoring state practice with respect to compliance. Although left to domestic devices, this is a matter of international law, and the ability to define and develop inter-

138. This is often distinguished from discretionary action as "ministerial."

139. That is, mandatory universal jurisdiction as opposed to merely permissive universal jurisdiction.

140. PILLOUD, *supra* note 135, ¶ 3621 (1987).

141. Additional Protocol I, *supra* note 4, art. 90.

national law in many ways hinges on being able to observe it.¹⁴² This includes the ability to observe how states graft the Conventions' mandates into their domestic codes, and that capability is hobbled by an inability to point to affirmative domestic law.

But perhaps the most important reason that uniform requirements would be desirable is that many of the behaviors involved in both classes of breach are *the same*, with only the difference in *outcomes* determining the level of repression required of states parties.¹⁴³ This profoundly undermines a distinction based on normative expression; such a distinction suggests that certain conduct is unacceptable only where it results in certain kinds of actual harm.¹⁴⁴ Needless to say, that's how the Geneva Conventions are drafted, so we cannot now quibble with the text on normative grounds not embodied therein. But we can at least reject the idea that it is solely for the sake of normative expression that the grave breaches have been set apart.

So, to the extent that the current regime of granting states broad discretion in dealing with nongrave breaches lacks justificatory and explanatory basis, the concern is not only with the vagueness of the regime in this area but also with its legitimacy.

And perhaps the most provocative implication involves the additional problem of how states treat other actors in light of their different levels of compliance with the prohibitions against nongrave breaches. States so inclined may be able to manipulate the entire IHL regime by taking advantage of the vagueness in this area. One example of this problem is particularly salient. Since September 11, 2001, there has been a great deal of academic and political debate about whether and to what extent the Geneva Conventions apply to nonstate actors.¹⁴⁵ The debate has hinged on a number of issues, many of which are not relevant to this discus-

142. Again, to some extent the very meaning of international law—not only customary international law, but also treaty law—depends on being able to adduce state practice. *Compare* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”), *with* VCLT, *supra* note 16, art. 31 (instructing that a treaty’s context be interpreted together with the subsequent practice of states parties in applying the treaty).

143. Although the U.S. War Crimes Act conscientiously includes the offense of attempt for the war crimes arising under Common Article 3 of the Geneva Conventions, there is no mention of attempt in the section on grave breaches. War Crimes Act of 1996, 18 U.S.C.A. § 2441 (2006). The Conventions themselves make no mention of attempt, which further emphasizes the weight given to outcomes in determining the gravity of a breach.

144. From a practical standpoint, the fact that the conduct involved is potentially identical suggests that uniformity in the obligations of states parties with respect to nongrave breaches would also better suppress grave breaches, assuming of course that passing criminal legislation is an effective method of suppressing grave breaches.

145. See, e.g., Derek Jinks, *The Applicability of the Geneva Conventions to the Global War on Terrorism*, 46 VA. J. INT’L L. 165, 167 (2005-2006); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 328 (2003); William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT’L L.J. 907, 908 (2002-2003).

sion.¹⁴⁶ But one of the arguments in this area that has found some traction is that, because the Taliban, al Qaeda, and their affiliates have systematically rejected the laws and customs of war, their fighters should not be allowed to benefit from the protections of the laws of war, and especially those protections afforded by Geneva Convention III.¹⁴⁷ To unpack that claim, one has to account for a number of moving parts. The first is that Geneva Convention III describes only a certain class of detainees—namely those who abide by the combatant restrictions of Article 4 of Geneva Convention III—as POWs.¹⁴⁸ The second piece is that only properly designated POWs are entitled to the protections of Geneva Convention III.¹⁴⁹ Finally, there is the idea that only the special protections of Geneva Convention III are operational in this context because Common Article 3 doesn't apply other than in a noninternational armed conflict (NIAC).¹⁵⁰ So to apply these rules syllogistically to, for instance, Taliban fighters, the argument goes as follows: Taliban fighters do not abide by the restrictions of Geneva Convention III; only combatants who abide by those restrictions can be POWs and afforded the concomitant protections; therefore, Taliban fighters are afforded no protections under the Geneva Conventions.¹⁵¹ Thus, an established and systematic practice of noncompliance with the Conventions by a party to an armed conflict—including where

146. These other issues include whether a “failed state” ought to be treated as the state party that originally agreed to and ratified the Conventions and whether a conflict between a state and a nonstate actor even fits within the Geneva Conventions’ rubric of “noninternational armed conflict” (NIAC). *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Attorney General of the United States, to William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> [hereinafter Yoo Memorandum]. For the text of “Common Article 3” giving rise to this latter contention, see Geneva Convention I, *supra* note 22, art. 3; Geneva Convention II, *supra* note 23, art. 3; Geneva Convention III, *supra* note 3, art. 3; Geneva Convention IV, *supra* note 26, art. 3.

147. Yoo Memorandum, *supra* note 146; *see also* Memorandum from Assistant Attorney General Jay S. Bybee to The White House Counsel on the status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949, at 2 (7 February 2002), available at http://dspace.wrlc.org/doc/bitstream/2041/70957/00200_020207_001display.pdf [hereinafter Bybee Memorandum].

148. Geneva Convention III, *supra* note 3, art. 4 (providing, *inter alia*, that “members of other militias and members of other volunteer corps” must, to be designated as POWs “fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; [and] (d) that of conducting their operations in accordance with the laws and customs of war.”).

149. *Id.* Note that this assertion addresses only the protections that are particular to Geneva Convention III.

150. *Id.* art. 3; *see also* RATNER, *supra* note 12, at 375–76.

151. I do not pretend that this is a watertight syllogism any more than I think it a watertight interpretation of the Geneva Conventions, but this is the argument. One troubling aspect of this argument is that there is considerable overlap between Geneva Conventions I and II and Geneva Convention III, which raises the question whether the former two Conventions apply to our hypothetical Taliban fighters in this posited framework. Such questions, although important and nettlesome, are beyond the scope of this Note.

the noncompliance amounts to systematically committing nongrave breaches—can be used to justify an interpretation of the Conventions that strips that party's combatants of their immunities under the Convention.

In this example, the most damning accusation leveled is that the Taliban do not abide by the laws and customs of war. The most egregious law-of-war violation alleged is that the Taliban and their "associated forces" refuse to observe the principle of discrimination (or distinction),¹⁵² which is the most fundamental duty of a combatant under international law.¹⁵³ But the Geneva Conventions are instruments of individual accountability, and not a way of designating as criminal enterprises¹⁵⁴ certain belligerent groups (assuming that they are associated with a bona fide state party). So assuming that some of the forces (that is, some "militias or volunteer corps"¹⁵⁵) fighting for the Taliban during the U.S. invasion or early occupation of Afghanistan were just soldiers in the conventional sense and that they were targeting only combatants, some other "systematic" violations must be doing the work of this argument.

Another potentially significant violation relevant to this analysis is the failure to wear "fixed distinctive sign[s] recognizable at a distance."¹⁵⁶ The rub is that the requirement to affix such insignia, although a violation of other laws and customs of war (namely the 1907 Hague Convention¹⁵⁷), is a facet of the proscription of perfidy in Additional Protocol I.¹⁵⁸ But this is

152. Yoo Memorandum, *supra* note 146 at 13.

153. See Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT'L L. 680, 680 (1945).

154. "Criminal enterprise" in the war crimes context is a concept laid out in the so-called Nuremberg Charter. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

155. Geneva Convention III, *supra* note 3, art. 4. To be sure, there is a certain corporate understanding implicit in the language of Geneva Convention III, but it seems plain that it cannot be purely corporate. If a given militia or corps has a single member who violates the law and custom of war, that surely cannot revoke the protections for the entire unit. Moreover, even those advancing this theory do not pretend that the duty is strictly corporate. See Bybee Memorandum, *supra* note 147 at 4. ("We conclude, however, that the four basic conditions that apply to militias must also apply, at a minimum, to members of armed forces who would be legally entitled to POW status.").

156. Geneva Convention III, *supra* note 3, art. 4. The other two criteria are also cited, but these are rarely relied upon as the determinative factors. The first—that of being commanded by a person responsible for his subordinates—simply cannot be assumed away for every company of fighters in Afghanistan at the relevant times. The second—that of carrying arms openly—is brushed aside even by most of the exponents of this argument, and with an almost embarrassing dismissiveness. See, e.g., Bybee Memorandum, *supra* note 147 at 3 ("[T]he Taliban militia carried arms openly. This fact, however, is of little significance because many people in Afghanistan carry arms openly."). Some, however, have refused to cede even this ground. See Yoo Memorandum, *supra* note 146 at 13 ("[T]hey have refused to wear uniform or insignia or carry arms openly . . .").

157. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>.

158. Additional Protocol I, *supra* note 4, art. 37. Admittedly, the colors on my palette bleed a little here. Additional Protocol I declares the line of reasoning above invalid by

not a grave breach. Only perfidy that results in an adversary being killed, captured, or wounded is prohibited at all,¹⁵⁹ and the presence *vel non* of visible insignia on armed combatants in a hot battle are not likely to be causally relevant. Moreover, the only such perfidy rising to the level of grave breach in Additional Protocol I is that involving the use of the protected emblems (the Red Cross, Red Crescent, etc.).¹⁶⁰

In effect, some states parties may categorically deny the applicability of the Geneva Conventions to other states parties' forces by virtue of a failure to adequately suppress the commission of nongrave breaches of the Conventions (which in this case is an omission). This is particularly puzzling given that so many states (including the United States) employ specialized commandos who quite clearly do not always conform to the visible-insignia requirements of the Geneva Convention.¹⁶¹ It strains credibility to suggest that these states would consider all their forces utterly without protection because, as a matter of state policy, some number of their combatants engage in covert operations.

If this is a legitimate exercise of discretion under the Geneva Conventions, the contours of this discretion are by no means clear.¹⁶² But supply-

expressly extending some of the protections of the Geneva Conventions even to parties who fail to abide by the laws and customs of war, *id.* art. 75, and it was in part this provision that led the United States to reject Additional Protocol I. See Reagan Letter, *supra* note 60. So it may be problematic to cite the terms of this later agreement when attempting to demonstrate a principle related to how parties carry out their obligations under the earlier agreement. Nevertheless, it is useful in this context because there is no dispute that this conduct (failure of combatants to wear a visible insignia) is a violation of IHL, and it is furthermore indirectly proscribed by Geneva Convention III in that it defines conditions for the applicability of the treaty. In other words, the argument put forth is that this is a failure to abide by (that is, a breach of) the terms of the Geneva Conventions, so it cannot be claimed that the logic here is built on entirely extrinsic breaches of IHL.

159. Additional Protocol I, *supra* note 4, art. 37.

160. *Id.* art. 85.

161. See Michael McAndrew, Note, *Wrangling in the Shadows: The Use of United States Special Forces in Covert Military Operations in the War on Terror*, 29 B.C. INT'L & COMP. L. REV. 153, 163 (Dec. 2006); see also Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH OCCASIONAL PAPER SERIES, no. 2, Winter 2005, at 39. As Colonel Watkin explains, there is a considerable amount of literature—including within M. Pictet's Commentary to the Geneva Conventions—concerning the precise meaning of the requirement to have fixed, recognizable insignia. The question is quite knotty. Operationally, “the capturing state has significant freedom to determine the status of detained personnel by adopting a narrow interpretation of the criteria thereby making detainees, or a group of opponents, unprivileged belligerents.” *Id.* at 30. Thus, the phenomenon I describe is not confined to a discussion of the implications of a certain understanding of the Geneva Conventions. Suffice it to say, however, that a lack of determinacy in this area cannot help but exacerbate the problem.

162. The mechanism animating such discretion would not be derived from the Conventions themselves. Presumably, this is premised on something like the VCLT's material breach standard. See VCLT, *supra* note 16, art. 60. Although some states (notably, the United States) are not parties to the VCLT, it is generally acknowledged that its provisions are merely the codification of customary international law. U.S. Dep't of State, *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139>

ing a few postulates suggests that this is a standard heavily biased in favor of states—and one that perhaps redounds to the benefit of only a few states. First, states typically control a treasury sufficient to comply with these kinds of requirements, whereas nonstate actors may not. Second, states that are also significant military powers can be assumed to use some form of covert military forces. Third, it has never been claimed that some normal state has rendered itself ineligible for protection under the Geneva Conventions by virtue of a failure to suppress covert acts that violate this requirement, even where such acts result in death, capture, or injury. Thus, some states can, as a matter of policy, engage in continual low-level violations of the Geneva Conventions to no effect,¹⁶³ while singling out other states or nonstate actors as having waived their rights under the Geneva Conventions by virtue of their violations rising to some critical mass. This is a hydra-headed problem only exacerbated by a vague standard with respect to the duties of states to suppress (and, therefore, to eschew policies permitting) nongrave breaches.

In sum, the fact that this area of IHL is so murky and poorly defined has far-reaching implications for the regime as a whole. The emphatic lack of clarity is not merely an academic enigma. Quite to the contrary, it suggests stark limits on the scope of the Geneva Conventions generally and, ultimately, on the effectiveness of the grave-breaches regime. In order to preserve the integrity of that regime (or, perhaps, to achieve it), these implications ought to be more thoroughly examined and better understood, and they should be thoughtfully considered as states continue to build upon the corpus of IHL. The Additional Protocols made some strides in that direction, but they still failed to address the inexplicable disparity in how states are expected to regulate conduct prohibited by the regime as a whole. And this failure persists in obscuring the proper role of domestic governments in implementing the norms of IHL.

CONCLUSION

There is a certain orderly beauty that is manifest in a conception of law as hierarchical. The most general, most accepted, and most important legal prescriptions are provided for in the highest stratum of legislation, and the narrowest, most idiosyncratic, and most parochial in the lowest. From this perspective, international law dwells at the summit of the structure, and all other strata reside below it. One need not push too hard on this conception before encountering flaws in the design. Nevertheless, there is a sense in which this *is* how law is ordered, from the global to the local. The Geneva Conventions are unquestionably a part of that highest tier, and their mandates map quite well onto our assumptions about the

.htm (last visited Apr. 12, 2013) (“The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”).

163. It nearly goes without saying, but a policy of engaging in perfidy is, of course, a failure to “suppress” perfidy.

importance and universal character of rules promulgated as international law. So it is puzzling that such a paradigmatic instantiation of that expectation does so little to clarify the duties of those subject to it with respect to the greatest portion of its prohibitions. But that is the case.

At the heart of my thesis is not an appeal for reform of the Geneva Conventions or a prescription for states parties in implementing the Conventions' requirements. Nor is it an attempt to suggest on normative grounds a more appealing interpretation of the Geneva Conventions than states parties have been inclined to adopt. I confess that I would happily make these cases elsewhere. Rather, this Note is an effort to illuminate an aspect of the Geneva Conventions that is radically undertheorized in light of its thoroughly explored context. Further, I have sought here to describe this facet of the regime as it relates to the divergence between the Geneva Conventions and Additional Protocols envisaged by the commentators and the ICRC on one hand, and the states parties themselves on the other. And finally, it is an attempt to explicate the broader implications of that divergence and the reality of state practice.

The current treatment in the literature of nongrave breaches suggests that they add little of moment to the overall scheme of the Geneva Conventions. One might take that to suggest that my concerns are a tempest in a teapot. But I am drawn more to idioms that reflect the sometimes out-sized impact of small features and phenomena, like "weakest link" or "butterfly effect." It must be admitted that the Geneva Conventions are intended to be a single, coherent whole, and that they are thought of as performing something akin to the function of a keystone in the IHL canon. To the extent that we are persuaded by this organic understanding of the Conventions and the IHL system, we should hesitate to dismiss any anomaly as "simple" or "minor."